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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 349

MARY COOLEY ROY,
Petitioner,

v.

LEONARD C. ROY, SR.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

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BRIEF IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the Florida trial court contained in the final decree is unreported and is properly reproduced at pages 12 and 13 of the Petition for Writ of Certiorari.

The opinion of the Supreme Court of Florida is reported at 73 So. (2d) 294 and is properly reproduced at pages 11 and 12 of the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on June 15, 1954 (R. 935). Rehearing was denied on July 5, 1954 (R. 942). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Did the Florida court err in awarding an *absolute* divorce to the husband (respondent herein) where the wife (petitioner herein) fully participated in the proceeding by entering a general appearance, by filing pleadings, by retaining attorneys to represent her throughout the proceeding, by herself testifying and by producing the testimony of others, notwithstanding that a prior judgment was entered in the District of Columbia awarding a *limited* divorce to the wife on *ex parte* proof in a case where the husband was not served with process in the District of Columbia and where he had not lived for some eight months?

2. Whether, in an action for *absolute* divorce, the Florida court erred in not giving "full faith and credit" to a judgment for a *limited* divorce entered by the District of Columbia court

   (a) Where the cause of action and relief sought was different from the causes of action and relief sought in the Florida court; and

   (b) Where the defendant in the District of Columbia proceeding (respondent herein) was not personally served within the District of Columbia, did not enter his appearance, did not file any pleadings and did not retain an attorney to represent him.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Respondent does not question that petitioner relies on the full faith and credit clause of the Constitution as set forth in Section 1, Article IV, and as implemented by 28 U.S.C., Section 1738.

STATEMENT

Respondent believes that a restatement of the history of this case will clarify the underlying facts and the chronology of the proceedings.

This is a Petition for Writ of Certiorari from a final decree of absolute divorce in favor of respondent after two successive trials in the Florida trial courts of the same issues.

Each of the parties is of mature age, being approximately sixty as to respondent and approximately fifty as to petitioner. The parties were married in 1922 and have two adult sons. The matrimonial domicile was in Washington, D. C. The parties were separated from March 8, 1945 until July 1, 1945 because of the alleged excessive intemperance of petitioner. On or about July 27, 1945, respondent finally left petitioner for the same reason, so he claims, and so the Florida Court found. The parties have not lived or cohabited together as husband and wife since July 27, 1945.

The issues in this case were thoroughly tried twice in the Circuit Court of Palm Beach County, Florida, by the same Circuit Judge, in both of which cases petitioner appeared and defended. These two trials were in separate successive suits for divorce instituted by respondent against petitioner. The issues in each case were substantially the same.

On May 17, 1952 (in the first suit, Chancery No. 29687), respondent filed his bill of complaint for absolute divorce

against petitioner. In that case, respondent sought an absolute divorce on the grounds of habitual intemperance, extreme cruelty and desertion.

On June 20, 1952 (in the first suit) petitioner filed her Answer, Counter-claim and Motion to Dismiss. In her Answer, petitioner denied that respondent was a resident of Florida and denied the charges made against her in the complaint. In her Counter-claim, petitioner made several charges against respondent (none of which were ever proven), and alleged that respondent had previously sued her for divorce in the United States District Court for the District of Columbia, which former suit had been dismissed by stipulation of the parties. In her Motion to Dismiss, petitioner alleged an insufficiency of averments in the complaint for absolute divorce to show that respondent was a Florida resident, to state a claim upon which relief could be granted, and further alleged that none of the charges made in the bill possessed sufficient basis on which to predicate a divorce.

On July 14, 1952 (in the first suit), respondent filed his Answer to petitioner's Counter-claim, denying all charges made against him in the Counter-claim.

On September 10, 1952, the first suit was tried, and on September 16, 1952, the court entered a final decree in which it found

(a) That the former litigation in Washington, D. C., dismissed by stipulation of the parties, constituted no bar to the maintenance of a suit in Florida;

(b) That on the testimony, respondent would be entitled to a divorce; but

(c) That it was not satisfied that respondent was a bona fide resident of Florida because of lack of corroborating testimony.

The same decree specifically provided that the parties were given leave to use the testimony and depositions on

behalf of plaintiff and defendant in that particular cause, in any other cause which may be instituted in that court by either of the parties if the evidence were appropriate to the issues as formulated in any future suit. In said decree, the court awarded counsel fees to petitioner in the amount of $500.00, which was paid.

On September 18, 1952, two days after the entry of the above decree dismissing without prejudice the first Florida divorce suit, petitioner filed her suit against respondent in the United States District Court for the District of Columbia praying for a limited divorce and/or separate maintenance. Plaintiff alleged cruelty and desertion. Copy of the complaint, together with a summons, was mailed to Florida to be personally served on respondent in Florida, which was done, but the effect of which under the District of Columbia laws was simply service by publication. (D. C. Code, Title 13, Sec. 13-108). This method of service was made on the basis of the affidavit of petitioner's counsel which stated that from February, 1952, respondent had been a resident of Palm Beach County, Florida. Respondent did not enter an appearance in the District of Columbia case, and the case proceeded on *ex parte* proof.

On September 24, 1952, respondent filed his second suit for divorce against petitioner in Florida in the same court where the first suit had been filed, being Chancery No. 30,147. This is the suit as to the result of which petitioner seeks a Writ of Certiorari.

In this second suit, respondent sought a divorce on the same grounds as in the former suit, that is, habitual intemperance, extreme cruelty and desertion. The allegations of the complaints in both the first and second Florida suits are substantially identical.

On October 20, 1952, petitioner filed a Motion for Stay of Proceedings in this second suit on the claimed ground that the pendency of her suit for limited divorce and/or separate maintenance filed in the District of Columbia was

a bar to the maintenance of this second divorce suit in Florida. In this Motion, petitioner also requested an extension of time to file her answer to the complaint.

On October 21, 1952, in the second suit, the Florida court denied petitioner's Motion for Stay of Proceedings.

On October 24, 1952, in the second suit, petitioner filed her answer to the complaint denying its allegations, seeking a stay of the second suit until determination of the District of Columbia suit, and a dismissal of the complaint. *Petitioner did not counter-claim for divorce and did not pray for any relief excepting as just stated.*

On February 4, 1953, the second Florida suit was tried on its merits before the same Circuit Judge who had tried the first suit. At the beginning of the trial, petitioner filed with the court an amendment to her answer attached to which were copies of certain proceedings in her District of Columbia suit for limited divorce and/or separate maintenance which had been tried *ex parte,* including the judgment awarding her the limited divorce dated December 17, 1952.

On the trial of the second Florida divorce suit, petitioner and respondent each offered in evidence, which was accepted by the court, all the record of, and all of the testimony and documents theretofore tendered by them respectively in the first Florida suit, and each of them adduced additional testimony by their own persons and by witnesses. The record of the trial in this second suit occupies about 1,000 pages.

On February 12, 1953, the Florida court entered its final decree in the second divorce suit granting a final decree of absolute divorce in favor of respondent, the recital in the decree being that the testimony was ample to sustain the grounds of divorce alleged in the complaint in the second suit.

On February 27, 1953, petitioner filed a Petition for Rehearing, which was denied on March 20, 1953.

On April 6, 1953, petitioner filed an extraordinary motion to vacate the final decree, which motion was denied on April 7, 1953.

The case went to the Supreme Court of Florida on the petition of petitioner, and that Court, on June 15, 1954, affirmed the Florida trial court, holding that the evidence was more than sufficient to sustain the trial judge in his finding that the petitioner had been guilty of habitual intemperance, and that the ground was not an issue in the District of Columbia proceeding but was an issue in the Florida proceeding.

REASONS FOR DENYING THE WRIT

The decision of the court below does not call for review by this court and no useful purpose would be served thereby. The only question raised by the petition is whether a judgment for a *limited* divorce obtained by petitioner in the District of Columbia on the ground of desertion in an *ex parte* proceeding is a bar to a fully litigated suit for an *absolute* divorce filed by respondent in Florida on the grounds of habitual intemperance, extreme cruelty and desertion. *No question is here presented as to the effect of the Florida decree on the District of Columbia decree awarding real and personal property to petitioner.* Petitioner does not suggest anywhere that the District of Columbia proceeding was instituted by her (immediately following the dismissal without prejudice of the first Florida suit and immediately preceding the second Florida suit) other than for the primary purpose of obtaining exclusive title to real and personal property situate in the District of Columbia and for the secondary purpose of preventing respondent from obtaining, if possible, an absolute divorce in the jurisdiction of his domicile. The fact is that petitioner did not seek any relief in the District of Colum-

bia suit which she could not have received in the first or second Florida suits if she had sought the same.[1]

A

Petitioner first urges that the court below erred in failing to dismiss the suit for *absolute* divorce brought by respondent in view of the fact that a prior judgment for a *limited* divorce had been obtained by petitioner in the District of Columbia. This contention, obviously, is without merit.

The record shows that petitioner personally and voluntarily appeared in the Florida proceeding and vigorously defended the charges brought against her in that suit. Petitioner filed an answer denying respondent's allegations and at the trial she testified at length and produced others to testify in her behalf. It is clear from the record that she was afforded her day in court with respect to every issue involved in the Florida litigation, including the jurisdictional issue of respondent's domicile. That the jurisdiction of the Florida court to enter a valid decree of absolute divorce was dependent upon respondent's domicile in that State is not disputed. This requirement was recognized by the Florida court and was resolved by a finding that respondent was a domiciliary of that State.[2] Considered in its entirety, the record shows that petitioner submitted herself to the jurisdiction of the Florida court and is therefore bound by its determination that it had jurisdiction of the subject matter and of the parties. *Davis* v. *Davis* (1938), 305 U.S. 32, 42; 83 L. ed. 26, 31, among others.

Petitioner does not in any wise suggest that she repudi-

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[1] In the first Florida suit, the court, in its decree, stated that the husband (respondent herein) would be entitled to a divorce on the ground of extreme cruelty with an appropriate lump sum or periodic, or a combination of both, alimony to the defendant (petitioner herein).

[2] Respondent removed to Florida in February of 1952 with the intention and purpose of establishing his permanent legal residence in that State and has resided in that State continuously since that time.

ates her apearance in the Florida action or the defenses interposed by her, or that the Florida decree is invalid in any way, or in fact, that there is any colorable basis for challenging it other than to now urge, after the decision was adverse to her, that the court below erred in not dismissing the proceeding on the theory of *res judicata* or estoppel by judgment. As previously stated, petitioner did not seek any relief in the independent proceeding instituted by her in the District of Columbia that could not have been obtained in the first or second Florida proceedings instituted by respondent.[3]

On the basis of this Court's decision in *Alton* v. *Alton*, — U. S. —; 98 L. ed. (Advance, p. 660, decided June 1, 1954), it would appear that no useful purpose would be served by reviewing the decision of the court below.

B

Petitioner's contention that the judgment obtained by her in the District of Columbia operated as *res judicata* upon the Florida proceeding or, in any event, worked an estoppel by judgment, disregards the rule that the doctrine of *res judicata* applies only to adjudications *based upon the same causes of action and in which the parties fully litigated the issues.* 30 Am. Jur., Sec. 172, page 914.

The cause of action in the District of Columbia proceeding was different from the causes of action in the Florida proceedings. In the former proceeding, petitioner merely alleged desertion and cruelty as grounds for *limited* divorce and/or separate maintenance, while in the latter proceeding, respondent alleged habitual intemperance together with extreme cruelty and desertion as grounds for *absolute* divorce. The record shows that although habitual intemperance was not an issue in the District of Colum-

[3] See footnote 1, *supra.*

bia proceeding, it was an important issue in the Florida proceeding.[4]

The causes of action in the two suits obviously were not the same and, accordingly, the issues in the Florida suit had not been previously adjudicated in the District of Columbia suit as petitioner contends.[5]

Assuming, *arguendo,* that the causes of action in the Florida and District of Columbia proceedings were identical, nevertheless, the doctrine of *res judicata* is not applicable to the Florida proceeding because the issues in the District of Columbia proceeding were not fully litigated by the parties as above and below shown. Petitioner cannot deny that the judgment obtained by her in the District of Columbia court was obtained on *ex parte* proof and in a case where respondent was not served within the jurisdiction of the District of Columbia Court, did not appear and did not defend.

It is apparent from the record that the relief sought by petitioner in the District of Columbia was entirely different from the relief sought by respondent in Florida. *The relief sought by respondent in Florida was obtained only after all of the issues had been fully litigated by both parties.*

Under the above circumstances, the court below was wholly justified in rejecting petitioner's contention that the

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[4] See Opinion of Supreme Court of Florida set forth in full in Appendix B at page 11 of Petition for Writ of Certiorari. The court below correctly found that the evidence was more than sufficient to sustain the finding of the Circuit Court that petitioner had been guilty of habitual intemperance.

[5] Petitioner's reference (at page 5 of the Petition) to the husband's contention that the wife's excessive drinking was the cause of the separation, followed by the statement that the District of Columbia court first held that the wife was without fault, is misleading because in the *ex parte* proceeding in the District of Columbia, there was no issue as to whether petitioner was guilty of excessive drinking. In other words, the issue of excessive drinking on the part of the wife was litigated in the Florida court for the first time and there could be no question of re-litigation in that proceeding.

judgment of the District of Columbia court was either *res judicata* or that it worked an estoppel of respondent's suit for absolute divorce in Florida.

C

Petitioner further contends that the court below erred in failing to give "full faith and credit" to the prior judgment for limited divorce entered by the District of Columbia court. There are several answers to this argument.

1. The prior judgment of the District of Columbia court granting a limited divorce to petitioner is not entitled to full faith and credit as would be the case had both spouses been before the District of Columbia court and the issues fully litigated in that jurisdiction. From this record, we know what happened in the District of Columbia proceeding. The record conclusively shows (a) that respondent was not personally served in the District of Columbia; (b) that he did not enter an appearance; (c) that he did not retain an attorney to represent him in the proceeding; and (d) that the judgment in favor of petitioner was entered solely on *ex parte* proof. It cannot be said that respondent was afforded his day in court with respect to the litigation in the District of Columbia as was the case with respect to the petitioner in Florida. The judgment of the District of Columbia court presumes jurisdiction over the persons unless disproved by the record itself. In the instant case, the presumption is overcome by the showing in the record that respondent never was served in the District of Columbia and at no time appeared in the case (R. 21, 23A, 47B, 48, 50, 56).

A judgment for limited divorce is not entitled to full faith and credit if it was entered in a proceeding in which the defendant was not personally served in the jurisdiction of the forum and in which he did not enter his appearance. *May* v. *Anderson*, 345 U. S. 528, 533; 97 L. ed. 1223. We

think it is clear as a matter of constitutional law that Florida is free to decide for itself the effect of the District of Columbia judgment when respondent was a stranger to that decree. *Sutton* v. *Leib* (1952), 342 U.S. 402, 410; 96 L. ed. 448; 72 S. Ct. 398.

In the event both parties had been before the District of Columbia court, the decree would have been conclusive as to the issues of fact upon which it was based. *Harding* v. *Harding,* 198 U.S. 317; 49 L. ed. 1066; 25 S. Ct. 679. But insofar as it attempts to regulate the future conduct of the parties, an *ex parte* decree for judicial separation is necessarily local in its operation on the nonappearing defendant. It is difficult to see upon what theory petitioner claims extraterritorial effect for the District of Columbia decree as against a nonresident, nonappearing defendant not served with process. *May* v. *Anderson, supra; Pettis* v. *Pettis,* 91 Conn. 608; 101 Atl. 13; 4 ALR 852, 858.

2. The prior judgment of the District of Columbia Court was for a limited divorce. Under no circumstances does the full faith and credit clause compel Florida to give the limited divorce decree of the District of Columbia court a greater effect than it has in the District of Columbia. In other words, petitioner is claiming, in effect, that Florida cannot grant an *absolute* divorce to a person domiciled in that State because the spouse prior thereto obtained a *limited* divorce in the District of Columbia. *Sherrer* v. *Sherrer* (1948), 334 U.S. 343; 92 L. ed. 1429; 68 S. Ct. 1087, 1097. In the case of *Davis* v. *Davis, supra.* this Court disposed of that contention against petitioner's claim because the wife in that case had entered a special appearance merely to contest jurisdiction.

3. In this case there exists none of the reasons which would prevent the Florida court, under the full faith and credit clause, from granting to respondent an absolute divorce. As a domiciliary of Florida, respondent was entitled

to invoke the jurisdiction of the courts of that State. Respondent frankly presented to the Florida court the grounds on which he sought release. Petitioner had actual notice of the suit and voluntarily appeared and defended in person and through attorneys. In view of these facts and of her conduct, adjudged repugnant to the marital relation, and as to which the court below found more than sufficient evidence, it would be unreasonable to hold that the Florida court was bound, under the full faith and credit clause, to deny respondent the absolute divorce he sought merely because petitioner's suit for a limited divorce was brought to an earlier conclusion, although filed only a few days prior to respondent's suit.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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October 18, 1954.